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No. 09-1334

Supreme Court, U.S.
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In The

Supreme Court of the United States

CHASE MANHATTAN BANK, USA, N.A.,

Petitioner,

vs.

HAROLD S. TAXEL, Chapter 7 Trustee,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

MICHAEL Y. MACKINNON*
KATHLEEN A. CASHMAN-KRAMER
PYLE SIMS DUNCAN & STEVENSON APC
401 "B" Street, Suite 1500
San Diego, CA 92101
Tel: 619-687-5200
Fax: 619-687-5210
Email: miguelm@psdslaw.com
Attorneys for Respondent
Harold S. Taxel, Chapter 7 Trustee

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

Respondent Harold S. Taxel, Chapter 7 Trustee ("Trustee") of the Chapter 7 estate of Jill C. Deuel respectfully submits this Brief in Opposition to the Petition for Writ of Certiorari ("Petition") filed by Petitioner Chase Manhattan Bank, USA, NA ("Chase" or "Petitioner").

INTRODUCTION

This case presents an issue of bankruptcy law involving 11 U.S.C. Section[1] 544(a)(3), a section which is neither novel nor ambiguous.[2] Petitioner has presented no "compelling reasons" to grant its Petition. *See* Sup. Ct. R. 10. More specifically, contrary to the Petitioner's argument, the Petitioner's first question presented does not involve an intra-circuit (or

[1] All references to "Section" are to the Bankruptcy Code, 11 United States Code, unless otherwise specified.

[2] Section 544(a)(3) provides: "The trustee shall have, as of the commencement of the case, and without regard to any knowledge of the trustee or of any creditor, the rights and powers of, or may avoid any transfer of property of the debtor or any obligation incurred by the debtor that is voidable by – . . . (3) a bona fide purchaser of real property, other than fixtures, from the debtor, against whom applicable law permits such transfer to be perfected, that obtains the status of a bona fide purchaser and has perfected such transfer at the time of the commencement of the case, whether or not such a purchaser exists."

any other) conflict; and incorrectly classifies the decision of the Ninth Circuit Court of Appeals by assuming wrong facts. In addition, the Petitioner's second question assumes that the decision of the Ninth Circuit Court of Appeals was in conflict with applicable California state law. For the reasons set forth herein, that assumption is incorrect. As a result, Respondent urges this Court to deny the Petition.

RESPONDENT'S COUNTER-STATEMENT OF THE CASE

A. The Facts – Proceedings in the Bankruptcy Court.

As the Bankruptcy Appellate Panel for the Ninth Circuit ("BAP") noted in its decision, *In re Deuel*, reported at 361 B.R. 509 (9th Cir. BAP 2006), and as Petitioner agrees, "[t]here are no material facts in dispute." As a result, the following facts are reiterated from the BAP decision. In 1999 debtor Jill C. Deuel ("Debtor") and her former spouse Will T. Deuel (collectively, the "Deuels") purchased a residence in Santee, California (the "Property"). In 2001 they refinanced the Property with a $122,400.00 loan secured by a recorded deed of trust that was assigned to an affiliate of Chase Manhattan Bank USA, N.A. ("Chase") (the "Prior Deed of Trust"). On September 4, 2002, the Deuels refinanced this debt with a new $136,000.00 loan from Chase secured by a new deed of trust against the Property which by mistake was not recorded (the "Unrecorded Deed of

Trust"). The Deuels used $121,170.79 of the new loan to pay off the balance of the 2001 loan. The Prior Deed of Trust was reconveyed by an instrument recorded on September 26, 2002. *Id.* at 511-12.

The Debtor filed her voluntary Chapter 7 bankruptcy petition that commenced this case on March 26, 2004 (the "Petition Date"). Harold S. Taxel was appointed as Chapter 7 Trustee ("Trustee"). With her bankruptcy petition Debtor filed her bankruptcy schedules and statement of financial affairs ("SFA") which mentioned Chase's claim and alleged lien in several places. In Schedule A (Real Property), she listed a "secured claim" of $134,740.00 against the Property. In Schedule D (Creditors Holding Secured Claims), she listed a claim held by Chase with a balance of $134,165.00, and stated: "Incurred: 2002, Lien: deed of trust, Security: [the Property]." In SFA item 3, she listed prepetition payments of $1000 per month to Chase. Attached to her SFA is a copy of her 2003 mortgage interest statement from Chase. *Id.* at 512.

On October 26, 2004, Chase filed in the bankruptcy court a Complaint to Quiet Title to Deed of Trust Against Real Property, naming as defendants the Deuels, the Respondent/Trustee, and Lake View Carlton Hills Homeowners Association (the "HOA"). Trustee filed a motion to dismiss the complaint and in the alternative for summary judgment, in which the Deuels joined. Chase filed an opposition and a cross-motion for summary judgment. On January 5, 2005, the Bankruptcy Court granted judgment in favor of

Petitioner, basing its ruling on the following: " . . . the schedules filed with the petition . . . provide constructive notice to the trustee as a bona fide purchaser of real property, that there was a secured claim out there . . . " and then expanded the holding in *In re Professional Investment Properties of America*, 955 F.2d 623 (9th Cir. 1992) ("*Professional Investment*") to conclude that the Respondent was unable to set aside the lien and would thus not take priority over Respondent under Section 544(a)(3). *Id.* at 512-13.

The Bankruptcy Court also ruled in favor of Chase on grounds of equitable subrogation, Chase's alternative basis for relief. Chase argued that it was equitably subrogated to the (released) lien created by the Prior Deed of Trust. The bankruptcy court stated that all the elements of equitable subrogation appeared to be satisfied. The bankruptcy court entered an order denying defendants' motions and granting Chase's cross-motion for summary judgment and thereafter issued a judgment in favor of Chase. Both the order and the judgment state that the defendants [i.e. the Respondent/Trustee, the HOA, and the Deuels] "have no right, title, interest or lien in or to the Property senior to the lien/security interest of [Chase] under the [Unrecorded] [D]eed of [T]rust." *Id.* at 513. Respondent timely appealed to the BAP.

B. The Decision of the Ninth Circuit Bankruptcy Appellate Panel (*In re Deuel*, 361 B.R. 509 (9th Cir. BAP 2006)).

Upon appeal from the Bankruptcy Court's ruling in favor of Petitioner that the Respondent/Trustee could not set aside the security interest under the unrecorded deed of trust, the BAP overruled the Bankruptcy Court's decision and held that: (1) the Trustee did not have constructive or inquiry notice of the unrecorded deed of trust, and (2) the creditor was not equitably subrogated to the released lien. It then reversed and remanded the Bankruptcy Court's Order granting summary judgment to Petitioner.

In doing so, the BAP recognized that "[o]ne of the most powerful weapons in a bankruptcy trustee's arsenal is the 'strong arm' power of Section 544(a)(3) to recover real property, subject to the same limitations that a bona fide purchaser would have when acquiring that property from the debtor outside of bankruptcy. Trustees for decades have defeated unperfected liens and unrecorded transfers, all to the benefit of unsecured creditors in bankruptcy." 361 B.R. at 510.

The BAP also carefully considered the Bankruptcy Court's reliance on the *Professional Investment* decision. The BAP recognized that "the court of appeals (in *Professional Investment*) carefully limited its decision to the effect of the petition in the involuntary case, as distinguished from information in the schedules. *Id.* at 628 n. 3, citing with

approval, *In re Gurs*, 27 B.R. 163, 165 (9th Cir. BAP 1983)." *Id.* at 511. The BAP in *Gurs* stated that "a § 544(a)(3) hypothetical bona fide purchaser as one who is without actual knowledge "at the instant the petition is filed," and purchases property from the debtor for value and in good faith." *In re Gurs*, 27 B.R. at 165. As a result, the BAP concluded that the information contained in a debtor's schedules and the statement of financial affairs filed in a voluntary bankruptcy case is not subject to the "Professional Investment rule," and therefore, those documents were not sufficient to impart notice or to defeat the Trustee's power.

The BAP also found that equitable subrogation did not apply to defeat Trustee Taxel's status as a bona fide purchaser under Section 544(a)(3). 361 B.R. at 518.

Petitioner timely appealed the BAP's decision to the Ninth Circuit Court of Appeals.

C. The Ninth Circuit Decision: *Chase v. Taxel (In re Deuel)*, 594 F.3d 1073 (2010).

The Ninth Circuit Court of Appeals ("Ninth Circuit"), at 594 F.3d. 1073 (9th Cir. 2010), affirmed the BAP's decision in all respects.

REASONS FOR DENYING THE INSTANT PETITION

Petitioner urges this Court to grant certiorari for two reasons. First, it claims that the Ninth Circuit's analysis and decision somehow ignore and, indeed, change the application of the law due to the advent of electronic filing of documents. Pet., pp. 13-16. It contends, inter alia, that both the BAP and the Ninth Circuit "departed" (Pet., p. 13) from settled law. Petitioner contends, inter alia, that *Professional Investment* compels a finding that "like the trustee in Professional Investment, the bankruptcy petition and the schedules put [Respondent] on inquiry or constructive notice of the Chase deed of trust." Pet., p. 15. Second, Petitioner urges that the Ninth Circuit's decision somehow misapplies California state law regarding notice of facts affecting title to real property. Pet., pp. 20-27. Neither argument has merit. The Ninth Circuit's opinion does not stray from established precedents, including applicable California state law precepts and, for the following reasons, the Petition should be denied.

I. Petitioner Has Presented No "Compelling Reasons" To Grant Its Petition.

One of the factors that this Court considers in deciding whether to grant certiorari is whether the decision is "in conflict with the decision of another United States Court of Appeals on the same important matter." Sup. Ct. R. 10(a). Petitioner does not specifically assert this ground. Rather, Petitioner

argues that there are no Supreme Court decisions which construe Section 544(a)(3) and, because this section involves an "important question of federal law," this Court should grant certiorari. Petitioner's argument is simply that the BAP and Ninth Circuit erred in refusing to expand the holding in *Professional Investments* beyond its application in an involuntary case. Moreover, Petitioner cannot cite to any conflict between the courts of appeals. In fact, Respondent has not located any published decision by any circuit court, by any district court, or by any bankruptcy appellate panel holding that the schedules in a voluntary chapter 7 case imparted knowledge to a chapter 7 trustee, which knowledge would be sufficient to negate his bona fide purchaser status and disabling his use of Section 544(a)(3).

Petitioner also suggests, without support, that this Court's review is necessary to help enforce Congress's intent in enacting Section 544(a)(3). Pet., p. 27. There is no support for any of Petitioner's positions and, therefore, no "compelling reason" for the granting of the instant Petition. As a result, the Petition should be denied.

A. The Court of Appeals Correctly Ruled That Respondent Was Entitled to Exercise his Strong-Arm Powers Under Section 544(a)(3) as the Bankruptcy Trustee and Take a Senior Interest Ahead of the Unrecorded Lien of the Petitioner.

Contrary to what the Petitioner advances, *Professional Investments* does not limit a trustee's Section 544(a)(3) avoiding powers in a voluntary chapter 7 case. As both the BAP and Ninth Circuit correctly recognized, *Professional Investment* addressed an extremely limited factual situation, namely, the filing of an involuntary Chapter 7 petition by the very creditor who asserted a security interest in real property on the face of the involuntary petition. Quite different from a voluntary filing, an involuntary petition predates the entry of the order for relief under which the trustee is appointed. *Cf.* Sections 301(b) (voluntary cases) with 303(h) (involuntary cases). "Voluntary and involuntary petitions operate differently in many respects: one is filed by the debtor, the other by a creditor; one does not list claims, the other states what interest the creditor filing it has; the commencement of a voluntary case by a petition "constitutes an order" (the automatic stay), but an involuntary petition does not." 594 F.3d at 1078.

Petitioner misstates a major factor that served as one of the bases for the BAP and Ninth Circuit decision. Petitioner states in its Petition that "[t]he Court of Appeals for the Ninth Circuit held that a *debtor's* bankruptcy petition may give inquiry or

constructive notice to a bankruptcy trustee of an unrecorded interest in a debtor's real property, under the law of the state where the property is located, that is sufficient to defeat a trustee's status as a hypothetical bona fide purchaser under 11 U.S.C. § 544(a)(3)." Pet., p. 3. This statement is misleading because this is not what the Ninth Circuit in *Professional Investment* held, as it was not the *debtor's* petition that put the trustee on notice, it was the involuntary petition filed by the creditor.

Among the required disclosures in a voluntary Chapter 7 petition is a list of prior filings for relief under Title 11. While Petitioner continues to argue (as it did before the BAP and Ninth Circuit) that this disclosure (with which the Debtor complied) puts Respondent/Trustee on constructive notice of the information contained in a prior year's Chapter 13 petition, Petitioner does not provide any explanation why outdated information that did not correspond with the current official records of the San Diego County (California) Recorder's Office would put a Chapter 7 trustee on constructive notice of Chase's unrecorded deed of trust. Indeed, even Petitioner does not dispute that a careful review of the San Diego County Recorder's Office records would have revealed that Petitioner had no deed of trust of record on the petition date: "[t]he problem, that resulted in this lawsuit, is that the new $136,000 Chase deed of trust was, by mistake, never recorded." Pet., p. 5.

The BAP addressed the issue of the information contained in the schedule of assets and liabilities (the "Schedules"). Specifically, the BAP ruled that, "by

definition, these documents [the Schedules] cannot provide constructive notice 'as of the commencement of the case' because it is only the petition that commences the case." 361 B.R. at 514-15. The BAP's conclusion was based in part on the nature of the documents themselves:

> In some cases (including this one) the bankruptcy schedules and other documents are presented for filing with the petition. That does not make them the same document, as evidenced by the separate Official Forms for each of them. Compare Official Forms 1 (voluntary petition) and 5 (involuntary petition) with, e.g., Official Forms 6, 6A through 6J, and 7 (bankruptcy schedules and SFA). See also *Castro*, 158 B.R. at 183 ("[T]he petition and the schedules are separate documents."). Indeed, the Federal Rules of Bankruptcy Procedure specifically provide that most required documents can be filed up to 15 days after the petition. See Fed. R. Bankr.P. 1007(b) and (c).
>
> For these reasons we hold that the bankruptcy schedules, SFA, and other required documents can only be filed after the petition, even if all these documents are physically presented to the clerk for filing together or if, as in this case, they are electronically combined into a single electronic file and transmitted onto the bankruptcy court's docket as such. All the pages of the documents might reach the court at essentially the same instant, but conceptually the

> case must be commenced before the bankruptcy schedules, SFA, and other required documents can be filed in that case. Therefore, by definition, these documents cannot provide constructive notice "as of the commencement of the case." Any constructive or inquiry notice from Debtor's bankruptcy schedules and SFA came too late to defeat Trustee's strong arm power under Section 544(a)(3).

361 B.R. at 515.

One of the major flaws in Petitioner's argument – as it has been all along – was recognized by the Ninth Circuit in its decision:

> [Petitioner] correctly argues that a real person buying the property and checking the court records would know from the schedules Deuel filed simultaneously with her petition that it had a lien. But we are talking about a metaphysical and not a real person. The trustee who is treated as a bona fide purchaser for value without notice as of the commencement of the case does not yet exist at the commencement of the case. The schedules may be filed simultaneously or within 15 days after the petition is filed [citing Fed. R. Bankr.P. 1007(c)], and there is no reason to condition the trustee's strong arm power on whether they are filed earlier than they need to be.

594 F.3d at 1077.

Indeed, the BAP had analyzed the differences between the voluntary petition form used in this case and the involuntary form used in the *Professional Investment* case, and noted that the involuntary petition form itself – unlike the voluntary petition form used in this case – has a space provided for the filing creditor to describe his claim. Specifically, in *Professional Investment*, the petitioning creditor described his claims as "supposedly secured by assignments of Deeds of Trust" [*Professional Investment*, 955 F.2d at 628], and that the voluntary form used in this case does not have "a space on the form to give any notice of Chase's Unrecorded Deed of Trust." 361 B.R. at 514-15. In addition, the petition and schedules are on different official forms. Compare Official Form 1 (voluntary petition) with Official Form 5 (involuntary petition). 594 F.3d at 1077. Finally, Petitioner continues to ignore that the plain language of Section 544 states that the Trustee's strong arm power exists "without regard to any knowledge of the trustee." 11 U.S.C. § 544(a).

B. Even if the Ninth Circuit Ignored the *Professional Investment Properties* Case, This Case Would Not Be Worthy of Certiorari.

Petitioner's argument necessarily calls for a change in the current law without offering any support for this proposition. The law as applied by the BAP and the Ninth Circuit is that a case is "commenced" by the filing of a petition. Sections 301(a), 302(a), 303(b);

Fed. R. Bankr.P. 1002(a). "Thus the bankruptcy trustee has the status of a bona fide purchaser 'at the instant the petition is filed.' *Professional Investment*, 955 F.2d at 628 n. 3 (quoting *In re Gurs*, 27 B.R. 163, 165 (9th Cir.BAP1983))." 361 B.R. at 515. In addition, "any information or notice which [the trustee] attained after that period [i.e., after the filing of the petition] did not bear on his status as a bona fide purchaser at the time of filing." *Professional Investment*, 955 F.2d at 628 and n. 3. In addition,

> [t]he bankruptcy schedules, SFA, and other required documents cannot be filed until there is a case in which to file them. As the applicable rules state, they must be filed "[i]n" a case. Fed. R. Bankr.P. 1007(a)-(c). See *In re Castro*, 158 B.R. 180, 183 (Bankr. C.D. Cal. 1993) ("The filing of a voluntary petition, not the schedules, commences the case."). See also *Harvey*, 222 B.R. at 895 nn. 11-12 (noting trustee's argument that bankruptcy schedules "are deemed filed *after* the filing of the petition that commences a bankruptcy case," but not deciding issue because other argument was dispositive) (emphasis in original).

361 B.R. at 515.

Petitioner asserts, without authority, that the advent of the technology of "efiling" of documents should, somehow, supplant or replace existing law, and should dictate a change to that law. Petitioner specifically claims that "[t]he BAP and the Court of Appeals. . . .

ignored the realities of electronic transmission of documents, or efiling of pleadings or documents, and how this technology, in actuality, impacts the knowledge a trustee obtains the instant a bankruptcy petition is filed." Pet., p. 13. Petitioner further argues that "the Court of Appeals imposed a standard for determining the legal effect of the simultaneous electronic transmission and filing of documents that ignores the practical and actual effect of this technology and what really happened. It is undisputed that the filing of the bankruptcy petition and the debtor's schedules, as well as the creation and appointment of Taxel as the bankruptcy Trustee and hypothetical bona fide purchaser, all occurred at the same moment in time because of the simultaneous electronic filing of the two official court forms." Pet., p. 15-16.

The Bankruptcy Code (11 United States Code) and the Federal Rules of Bankruptcy Procedure contemplate that debtors may well file their schedules at the same time that they file their petitions in a voluntary case. *See* Section 521(a)(1)(B)(i); Fed. R. Bankr.P. 1007(c), "[i]n a voluntary case, the schedules and statements, other than the statement of intention, shall be filed with the petition, or within 15 days thereafter . . . " This procedure was in effect prior to the enactment of the Bankruptcy Code. *See, e.g.*, Rules 108(a), (b) of the Bankruptcy Rules to the Bankruptcy Act of 1898: "[t]he bankrupt shall file with the court schedules of all his debts and all his property and a statement of his affairs, prepared by him in the manner prescribed by official forms No. 6

and either No. 7 or No. 8, whichever is appropriate." Petitioner urges the Court to treat the advent of electronic filing as a reason to change established law and to effect a merger of the voluntary petition with the schedules. In the majority of voluntary Chapter 7 cases, the trustee is appointed after the schedules are on file. Petitioner would have the applicability of Section 544(a)(3) depend upon whether the debtor filed the schedules before or after the trustee was appointed. Such thinking is contrary to the fundamental bankruptcy policy by which assets are liquidated and distributed pro rata in accordance with the priorities established by Congress. Petitioner's position, if taken to its logical conclusion, would result in a judicial "repeal" of Section 544(a)(3).

Petitioner's argument notwithstanding, the Ninth Circuit indeed considered and rejected Petitioner's position below:

> In this case the petition and the schedules were filed simultaneously by means of electronic filing. Does that mean that the trustee took with notice of the lien disclosed in the schedules? If we were talking about real people walking over to the bankruptcy court and looking at the documents, the answer would be yes, but we are not. As is often the case in property law, we speak not of the physical but of the metaphysical. The statute says that a chapter 7 bankruptcy is "commenced by the filing with the bankruptcy court of a petition," so the petition and only the petition commences the case, regardless

> of what else happens at the same time. As the Bankruptcy Appellate Panel explained, the schedules "cannot be filed until there is a case in which to file them." The trustee has not even been appointed when the petition is filed, and could not possibly be a bona fide purchaser for value without notice upon the filing of the petition, but he is treated by the statute as though he were.

594 F.3d at 1076-77 (footnotes omitted). The Ninth Circuit went on to note that

> [t]he conclusion we reach is not based solely on literalism and metaphysics. It is practical. The Bankruptcy Appellate Panel correctly pointed out that if schedules could defeat the trustee's status as a bona fide purchaser for value without notice in a voluntary petition, a debtor could use simultaneous filing of petition and the schedules to favor one creditor over others. Sometimes creditors and debtors acting together before the bankruptcy have good reason to delay recording (footnote) and may have a continuing reason after filing to keep assets from other creditors. A fundamental purpose of bankruptcy is fair distribution pro rata within the classes of creditors determined by Congress of a debtor's inadequate assets. (footnote) That purpose could be defeated if a debtor were able to jump an unrecorded security interest over the trustee's status on behalf of other creditors by mentioning it when the debtor filed the petition.

594 F.3d at 1078 (footnotes omitted).

Petitioner cites no authority which would compel this Court to deviate from the current state of the law. Indeed, Petitioner recognizes that the petition and the schedules are in fact different documents, and that Bankruptcy Rule 1007(b) allows the debtor to file schedules 15 days after a petition is filed. *See* Fed. R. Bankr.P. Rule 1007(b). Pet., p. 17.

Petitioner has not advanced any sound reasoning for changing the existing law in this regard. As the BAP stated, "[w]e do not ignore binding precedent nor do we speculate further. We simply construe *Professional Investment* to be limited in its application to an involuntary petition wherein the petitioning creditor asserts its lien. We express no opinion as to the outcome in any future case wherein a voluntary petitioner departs from Official Form 1 and inserts information about a creditor." 361 B.R. at 516, n. 7. As a result, this petition is not worthy of a grant of certiorari.

II. The Decisions Below Are Correct, and the Decision of the Ninth Circuit Court of Appeals Is Not in Conflict With Applicable California State Law.

Review by this Court is also unnecessary because both the BAP and the Ninth Circuit reached the right conclusion based on the facts of this case, and even considering the framework provided in *Professional Investment*. Petitioner suggests, without support, that the Ninth Circuit decision "abrogated California law

where that law controls the federal question of the trustee's avoiding powers under section 544(a)(3)." Pet., p. 27. Yet, the authorities cited by Petitioner were indeed cited to and considered by the BAP and the Ninth Circuit courts in their respective decisions.

Both the BAP and the Ninth Circuit, as well as the parties, agree that Section 544(a)(3) imbues a trustee with all of the rights and powers of a bona fide purchaser of real property, and that those rights are defined under the law of the state in which the real property is located. 594 F.3d at 1078-79, citing *Robertson v. Peters (In re Weisman)*, 5 F.3d 417, 420 (9th Cir. 1993), a case relied upon by Petitioner. The Ninth Circuit examined Petitioner's argument in this regard and found it without merit:

> California law provides that a conveyance, "from the time it is filed with the recorder for record is constructive notice of the contents thereof to subsequent purchasers and mortgagees." [Cal. Civil Code Section 1213.] Chase Manhattan did not record, so the trustee did not have constructive notice of its lien. Under California law, a conveyance is "void as against any subsequent purchaser or mortgagee of the same property, or any part thereof, in good faith and for a valuable consideration, whose conveyance is first duly recorded." [Cal. Civil Code Section 1214.] The strong arm clause enables the trustee to avoid an unrecorded lien as if he were "a bona fide purchaser of real property, other than fixtures, from the debtor, against whom

> applicable law permits such transfer to be perfected, that obtains the status of a bona fide purchaser and has perfected such transfer at the time of the commencement of the case." [11 U.S.C. § 544(a)(3).] That means that we are to deem the trustee not only to have purchased the property for value without notice of the unrecorded lien, but also to have recorded his deed when the petition was filed. It is as though he were shopping for a place to live, saw a classified ad, bought the condo after doing a title search, and recorded the deed, all at the instant the petition was filed. Under California law, such recording would render Chase Manhattan's lien void.

594 F.3d at 1078-79.

Petitioner cites, among other cases, *Newhall v. Hatch*, 134 Cal. 269 (1901); *Wolf v. Mahrdt (In re Chenich)*, 100 B.R. 512 (9th Cir. BAP 1987); *Buehler v. Oregon-Washington Plywood Corp.*, 17 Cal.3d 520 (1976) and *Robertson v. Peters (In re Weisman)*, 5 F.3d 417, 420 (9th Cir. 1993) for the propositions that a subsequent purchaser is put on inquiry notice by certain events, including prior recorded documents, and thus had a duty to inquire further regarding the property. Again, the fact which distinguishes these cases from the instant one is the fact that, in those cases, the documents which purport to convey notice were already recorded while, here, Petitioner's deed of trust was not.

Contrary to Petitioner's suggestion, the Ninth Circuit's decision was indeed in conformity with the applicable tenets of state law in this area. As a result, Petitioner's argument that the Ninth Circuit decision is in conflict with California law, must fail.

CONCLUSION

In its conclusion the BAP stated:

> Section 544(a)(3) grants the bankruptcy trustee for the benefit of all creditors the rights of a bona fide purchaser of the real property "as of the commencement of the case." A debtor's bankruptcy schedules and other required documents cannot be filed until there is a case in which to file them, so by definition they cannot impart any constructive or inquiry notice until after commencement of the case. Nothing in Debtor's bankruptcy schedules or SFA has any bearing on Trustee's statutory strong arm power to avoid Chase's Unrecorded Deed of Trust.

361 B.R. at 518. The Ninth Circuit agreed. Nothing in the Petition compels this Court to reconsider that well-reasoned and recited rule in this case.

Petitioner has failed to establish any basis upon which this Court should grant the Petition and consider Chase's arguments against the Ninth Circuit's

decision in this matter. The Petition for a Writ of Certiorari should be denied.

Dated: June 2, 2010

Respectfully submitted,

MICHAEL Y. MACKINNON*
KATHLEEN A. CASHMAN-KRAMER
PYLE SIMS DUNCAN & STEVENSON APC
401 "B" Street, Suite 1500
San Diego, CA 92101
Tel: 619-687-5200
Fax: 619-687-5210
Email: miguelm@psdslaw.com
Attorneys for Respondent
Harold S. Taxel, Chapter 7 Trustee

**Counsel of Record*